Supreme Court, U.S.
FILED
MAY 28 1991
OFFICE OF THE CLERK

No. 90-1642

In The

Supreme Court of the United States

October Term, 1990

BOROUGH OF ROSELLE, FELIX GRABOWSKI and WILLIAM SCHWARTZ,

Petitioners,

v.

REGINA BROWN, Administratrix and Administratrix Ad Prosequendum of the Estate of Debbie Evans,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

*Barry T. Albin, Esq.
James E. Trabilsy, Esq.
Richard P. Jacobson, Esq.
*Counsel of Record
Wilentz, Goldman & Spitzer
A Professional Corporation
90 Woodbridge Center Drive
P.O. Box 10
Woodbridge, New Jersey 07095
(908) 636-8000
Attorneys for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

REASONS FOR DENYING THE WRIT 1

POINT I

THE COURT OF APPEALS CORRECTLY RULED THAT IT LACKED JURISDICTION OVER ALL ISSUES RAISED BY PETITIONERS' INTERLOCUTORY APPEAL OTHER THAN THOSE INVOLVING QUALIFIED IMMUNITY 1

POINT II

THE COURT OF APPEALS CORRECTLY RULED THAT IT LACKED JURISDICTION TO REVIEW THE DISTRICT COURT'S DENIAL OF IMMUNITY TO PETITIONERS ON RESPONDENT'S STATE LAW CLAIMS..... 10

CONCLUSION 16

TABLE OF AUTHORITIES

Page

CASES

Abney v. United States, 431 U.S. 651 (1977). . 3, 4, 5, 7, 8

Akerly v. Red Barn Sys., Inc., 551 F.2d 539 (3d Cir. 1977) 7

Akerman v. Oryx Communications, Inc., 810 F.2d 336 (2d Cir. 1987) 6

Bolden v. Alston, 810 F.2d 353 (2d Cir), *cert. denied*, 484 U.S. 896 (1987) 8

Brown v. Grabowski, 922 F.2d 1097 (3d Cir. 1990). *passim*

Buckley v. Fitzsimmons, 919 F.2d 1230 (7th Cir. 1990) 7

Budinich v. Becton Dickinson & Co., 486 U.S. 196 (1988) 12, 13

City of Los Angeles v. Heller, 475 U.S. 796 (1986) . . . 9, 10

Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949) 3, 4

Colorado v. Idarado Mining Co., 916 F.2d 1486 (10th Cir. 1990), *cert. denied*, 111 S. Ct. 1584 (1991) 8

Hoxworth v. Blinder, Robinson & Co., Inc., 903 F.2d 186 (3d Cir. 1990) 6

Illinois ex rel. Hartigan v. Peters, 861 F.2d 164 (7th Cir. 1988) 5, 7

Intermedics Infusaid v. Regents of Univ. of Minn., 804 F.2d 129 (Fed. Cir. 1986) 7

Kershner v. Mazurkiewicz, 670 F.2d 440 (3d Cir. 1982) 6, 8

TABLE OF AUTHORITIES – Continued

Page

Kraus v. County of Pierce, 793 F.2d 1105 (9th Cir. 1986), *cert. denied*, 480 U.S. 932 (1987) 2

Lee v. Doe, 232 N.J. Super. 569 (App. Div. 1989) 14

Manhattan Beach Police Officers Ass'n v. Manhattan Beach, 881 F.2d 816 (9th Cir. 1989) 5

Marrical v. Detroit News, Inc., 805 F.2d 169 (6th Cir. 1986) 11, 12, 13

McCowan v. Sears, Roebuck & Co., 908 F.2d 1099 (2d Cir.), *cert. denied*, 111 S. Ct. 250 (1990) 8

Mitchell v. Forsyth, 472 U.S. 511 (1985) 1, 3, 10, 14

Newman v. Massachusetts, 884 F.2d 19 (1st Cir. 1989), *cert. denied*, 110 S. Ct. 1132 (1990) 7

Patterson v. Portch, 853 F.2d 1399 (7th Cir. 1988) 6, 7

Rochinsky v. State of N.J. Dep't of Transp., 110 N.J. 399 (1988) 14

Sorey v. Kellett, 849 F.2d 960 (5th Cir. 1988) ..11, 12, 13

Stewart v. Baldwin County Bd. of Educ., 908 F.2d 1499 (11th Cir. 1990) 8

United States ex rel. Valders Stone & Marble, Inc. v. C-Way Constr. Co., 909 F.2d 259 (7th Cir. 1990) ...5, 6

United States v. Spears, 859 F.2d 284 (3d Cir. 1988) 2

STATUTES

28 U.S.C. § 1291 ....2, 12

28 U.S.C. § 1292 .....4, 5, 6, 15

42 U.S.C. § 1983 1

REASONS FOR DENYING THE WRIT

POINT I

THE COURT OF APPEALS CORRECTLY RULED THAT IT LACKED JURISDICTION OVER ALL ISSUES RAISED BY PETITIONERS' INTERLOCUTORY APPEAL OTHER THAN THOSE INVOLVING QUALIFIED IMMUNITY

Regina Brown filed this action pursuant to 42 U.S.C. § 1983, as administratrix of the estate of her sister Debbie Evans, alleging that Ms. Evans' constitutional rights were violated by members of the Roselle (New Jersey) police force and the Borough of Roselle, petitioners herein. The district court granted petitioners summary judgment on one count and denied summary judgment on the remaining counts – including petitioners' claims that they were entitled to qualified immunity. Petitioners appealed to the Third Circuit on the basis of this Court's decision in *Mitchell v. Forsyth*, 472 U.S. 511 (1985), which permits an immediate appeal from the denial of summary judgment on the ground of qualified immunity. Petitioners argued that the other issues – over which the court of appeals had no jurisdiction – should be addressed under the doctrine of pendent appellate jurisdiction.

Although the Court of Appeals for the Third Circuit found the individual police officers were entitled to qualified immunity, it determined that it lacked jurisdiction over the remaining issues, including the appeal by the Borough of Roselle, the Roselle Police Department and Chief Trolan in his official capacity [hereinafter "municipal defendants"] from the district court's refusal to grant

them summary judgment.[1] *Brown v. Grabowski*, 922 F.2d 1097, 1105 (3d Cir. 1990). The Third Circuit correctly found that it lacked jurisdiction over the appeal by the municipal defendants because the denial of a motion for summary judgment ordinarily is not a "final decision," and therefore, is not an immediately appealable order. *Id.*; *United States v. Spears*, 859 F.2d 284, 286 (3d Cir. 1988); *see* 28 U.S.C. § 1291.

Petitioners contend that the court of appeals should have entertained the issues appealed by the municipal defendants under the doctrine of pendent appellate jurisdiction. Moreover, petitioners seek to expand the scope of pendent appellate jurisdiction so that in practically all cases where a district court rejects the defense of qualified immunity on summary judgment, a defendant may appeal not only the qualified immunity question but also the remaining issues in the case. Without explicitly stating so, petitioner are, in effect, asking the Court to overturn well-established precedent of this Court. Respondent submits that the Third Circuit correctly declined to exercise jurisdiction over the issues unrelated to qualified immunity, and there is no overriding interest

---

[1] The municipal defendants, unlike the individual police officers, may not claim qualified immunity as a defense for the simple and irrefutable reason that a municipality has no immunity from liability for violations of constitutional rights. *Owen v. City of Independence*, 445 U.S. 622 (1980). Accordingly, the Third Circuit properly held that it did not have jurisdiction over the appeals by the municipal defendants. *Brown*, 922 F.2d at 1105; *see also Kraus v. County of Pierce*, 793 F.2d 1105 (9th Cir. 1986) (denial of county's summary judgment motion not appealable despite appeal by individuals pursuant to *Mitchell* exception), *cert. denied*, 480 U.S. 932 (1987).

which requires this matter to be addressed by this Court. Accordingly, the petition should be denied.

One of the few exceptions to the final judgment rule allows a party to appeal the denial of qualified immunity. *E.g., Mitchell v. Forsyth*, 472 U.S. 511 (1985). *Mitchell* expressly holds that "a district court's denial of a claim of qualified immunity . . . is an appealable 'final decision' within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment." *Id.* at 530. *Mitchell* thus represents an example of the "collateral order doctrine" which allows the appeal of a district court ruling prior to a final decision if it falls within "that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949). The denial of qualified immunity satisfies these criteria because it involves the right not to be subjected to trial, a right that would be negated were an official embodied with qualified immunity forced to undergo trial without the opportunity to appeal prior to a final decision. *Mitchell*, 472 U.S. at 526-27. The scope of the collateral order doctrine is limited and, as an exception to the final judgment rule, is not meant to be expanded. *Accord Mitchell*, 472 U.S. 511.

This Court previously has ruled on the issue of whether an otherwise nonappealable order may be decided along with an order properly appealed pursuant to the collateral order doctrine. *Abney v. United States*, 431 U.S. 651 (1977). For a court of appeals to address issues beyond the denial of qualified immunity, the additional

issues independently must satisfy the requirements for an interlocutory appeal, pursuant to either 28 U.S.C. § 1292 or the collateral order doctrine. *See id.* at 663. In *Abney*, a prisoner challenged his indictment for exposing him to double jeopardy and for failing to charge an offense. The Court held that the denial of the motion to dismiss the indictment on double jeopardy grounds fell within the "small class of cases" deemed "final decisions" pursuant to the collateral order doctrine of *Cohen*. *Id.* at 659. The guarantee against double jeopardy protects against being twice tried for the same offense, a right that would be irreparably lost if an individual were to be tried a second time before an appeal could be taken. *Id.* at 661-62. Nevertheless, the Court ruled that only the double jeopardy issue could be appealed on an interlocutory basis:

> [W]e, of course, do not hold that other claims contained in the motion to dismiss are immediately appealable as well. . . . Rather, such claims are appealable if, and only if, they too fall within *Cohen*'s collateral-order exception to the final-judgment rule.

Id. at 663. Thus, merely because one ruling is appealable under the collateral order doctrine does not mean that other decisions may piggyback along to be heard as well. *Id.*

The collateral order doctrine represents a significant but narrow exception to the requirement of finality that undergirds the federal legal system. Yet, petitioners seek to have the exception swallow the rule. As a result, litigants in § 1983 cases would be encouraged to raise spurious claims of qualified immunity which, when

denied, would enable them to appeal the entire controversy, and not simply the denial of qualified immunity. *Abney*, 431 U.S. at 663. One court has remarked on how appeals from denials of qualified immunity appear to have become "a routine part of every section 1983 case surviving a defense motion for summary judgment . . . often caus[ing] regrettable expense and delay." *Manhattan Beach Police Officers Ass'n v. Manhattan Beach*, 881 F.2d 816, 817 (9th Cir. 1989). Another potential misapplication could occur in cases appealed in accordance with the certification procedure of 28 U.S.C. § 1292. In that situation, once a question were certified by the district court and accepted by the court of appeals, nothing would stop an assertive defendant from bootstrapping related matters by invoking pendent appellate jurisdiction.

Petitioners assert that the doctrine of pendent appellate jurisdiction permits them to link the appeal of the municipal defendants to that brought below by the individual officers who successfully appealed the district court's denial of qualified immunity. Pendent appellant jurisdiction is proper in the following circumstances:

> When an ordinarily unappealable interlocutory order is inextricably entwined with an appealable such order, the former may be reviewed at the same time if, but only if, there are compelling reasons for not deferring the appeal of the former order to the end of the lawsuit, at which time all previous orders are appealable together with the final judgment.

Illinois ex rel. Hartigan v. Peters, 861 F.2d 164, 166 (7th Cir. 1988). Pendent appellant jurisdiction may be found only in a limited class of cases, *United States ex rel. Valders*

Stone & Marble, Inc. v. C-Way Constr. Co., 909 F.2d 259, 261 (7th Cir. 1990); *Patterson v. Portch*, 853 F.2d 1399, 1403 (7th Cir. 1988), and is a procedural device that rarely should be used because of the danger of abuse. *Akerman v. Oryx Communications, Inc.*, 810 F.2d 336, 339 (2d Cir. 1987). A close relationship between the nonappealable order and the appealable order will not suffice; it must be practically indispensable that the merits of the unappealable order be addressed in order to resolve the properly-taken appeal. *Valders*, 909 F.2d at 262.

It is clear that the Third Circuit did not deem the appeal by the municipal defendants appropriate for invoking pendent appellate jurisdiction. *Brown*, 922 F.2d at 1106 n.3. The Third Circuit correctly applied its own precedent in following *Kershner v. Mazurkiewicz*, 670 F.2d 440 (3d Cir. 1982), which held that the appeal of an order denying a preliminary injunction did not also encompass denial of a class certification order unless the preliminary injunction issue, appealable pursuant to 28 U.S.C. § 1292(a)(1), directly controlled the disposition of the otherwise nonappealable issue or was inextricably bound thereto. 670 F.2d at 449; *see Brown*, 922 F.2d at 1106 n.3. The concern militating against a broader application of the doctrine is the disruption of the functioning of the district courts by prematurely taking matters out of its hands. *Kershner*, 670 F.2d at 449. A mere nexus between the two issues is not sufficient to justify a decision to assume jurisdiction. *Id.* at 449-50; *see also Hoxworth v. Blinder, Robinson & Co., Inc.*, 903 F.2d 186, 209 (3d Cir. 1990) (pendent appellant jurisdiction is not conferred to otherwise nonappealable orders simply because two orders arise out of same factual matrix, but is available

only to extent necessary to ensure meaningful review of appealable order).

Besides the Third Circuit, other courts have taken an equally narrow view toward the exercise of jurisdiction over claims pendent to collateral orders properly appealed. *E.g., Buckley v. Fitzsimmons*, 919 F.2d 1230, 1239 (7th Cir. 1990) (*Abney* tells us not to allow interlocutory appeals to acquire barnacles); *Newman v. Massachusetts*, 884 F.2d 19, 22 (1st Cir. 1989) (interlocutory review limited to issue of qualified immunity even when remaining issues in summary judgment motion are inexorably intertwined with qualified immunity issue), *cert. denied*, 110 S. Ct. 1132 (1990); *Illinois ex rel. Hartigan v. Peters*, 861 F.2d 164, 166 (7th Cir. 1988) (pendent appellant jurisdiction is not to be used for appeal of normally unappealable interlocutory orders that happen to be related, even closely related, to an appealable order); *Patterson v. Portch*, 853 F.2d 1399, 1403 (7th Cir. 1988) ("We can review an unappealable order only if it is so intwined with an appealable one that separate consideration would involve sheer duplication of effort by the parties and this court. (citation omitted) Any laxer approach would allow the doctrine of pendent appellant jurisdiction to swallow of the final-judgment rule"); *Intermedics Infusaid v. Regents of Univ. of Minn.*, 804 F.2d 129, 134 (Fed. Cir. 1986) (the major factor in determining whether to exercise pendent appellate jurisdiction is the extent that review of the appealable order will involve consideration of factors relevant to the otherwise nonappealable order); *see also Akerly v. Red Barn Sys., Inc.*, 551 F.2d 539, 543 (3d Cir. 1977) (advocating a restrictive attitude toward examining

all issues in a controversy when only one is an appealable collateral order).

For some inexplicable reason, other courts of appeals fail to follow (or even mention) *Abney*. *E.g.*, *Stewart v. Baldwin County Bd. of Educ.*, 908 F.2d 1499, 1508-09 (11th Cir. 1990) (in appeal challenging denial of qualified immunity, court used discretion to assert pendent appellate jurisdiction over denial of eleventh amendment immunity); *McCowan v. Sears, Roebuck & Co.*, 908 F.2d 1099, 1105 (2d Cir.) (exercising pendent appellate jurisdiction though expressing concerns about circumventing procedural rules by allowing otherwise nonappealable order to ride coattails of appealable order), *cert. denied*, 111 S. Ct. 250 (1990).

Respondent submits that the standard applied by the Third Circuit in not exercising pendent appellate jurisdiction is consistent with precedent of this Court and should not be disturbed. *Brown*, 922 F.2d at 1106 n.3; *Kershner*, 670 F.2d at 449. However, the result reached by the Third Circuit in declining to exercise pendent appellant jurisdiction would be no different even had the Court adopted the three-part test articulated by the Tenth Circuit in *Colorado v. Idarado Mining Co.*, 916 F.2d 1486, 1491 (10th Cir. 1990), *cert. denied*, 111 S. Ct. 1584 (1991). *See* Petition at 17. Even under this admittedly looser standard, pendent appellant jurisdiction remains inappropriate in this particular situation. First, the nonappealable issue is not sufficiently developed for review since the matter reaches the Court on summary judgment with an incomplete record. *Cf. Bolden v. Alston*, 810 F.2d 353, 356 (2d Cir.) (where case already decided on merits, court may exercise jurisdiction to review liability determinations along

with denial of qualified immunity), *cert. denied*, 484 U.S. 896 (1987). Second, the Tenth Circuit's standard assesses whether the appealable and nonappealable issues involve consideration of closely related factors. In this case, the determination of whether the municipal defendants engaged in an unconstitutional practice, policy or custom involves a different analysis from that utilized in evaluating the conduct of the individual officers. The final factor in the Tenth Circuit's framework also is not satisfied because rather than serving notions of "judicial economy," review of the nonappealable issue unduly burdens the court of appeals and usurps the proper role of the district court. In addition, the benefits from the district court judge's unique insight and direct familiarity with the litigation would be lost. The court of appeals similarly would be deprived by the absence of a full record. Pendent appellate jurisdiction should not be exercised to undermine the essential role of the trial judge.

Petitioners further contend the claims against the municipal defendants are barred by the decision in *City of Los Angeles v. Heller*, 475 U.S. 796 (1986). Petition at 16-17. *Heller* is quite distinct from the matter now before the Court because in *Heller*, a jury had determined that the plaintiff suffered no constitutional harm by the defendant police officer. 475 U.S. at 798-99. The district court consequently dismissed the claim against the city, but the Ninth Circuit reversed. The Supreme Court simultaneously granted certiorari and reaffirmed the dismissal for the city, holding that in the absence of any harm of a constitutional magnitude to the plaintiff, the city could not be liable. *Id.* The decision by the Third Circuit in *Brown*, by contrast, merely ruled that the individual

police officers were qualifiedly immune from the claims against them because the asserted right was not clearly established at the time it was violated. The determination of qualified immunity, however, has no bearing whatsoever on the remaining claim against the municipal defendants. In fact, the record fully supports respondent's allegations that Debbie Evans' right to equal protection of the law was violated by the municipal defendants. Therefore, petitioners' reliance on *Heller* is misplaced.

In conclusion, petitioners have not adequately set forth sufficient reasons to justify issuance of a writ of certiorari. Petitioners' effort to ensnare the rule of finality by expanding the limited scope of the collateral order doctrine should be denied.

POINT II

THE COURT OF APPEALS CORRECTLY RULED THAT IT LACKED JURISDICTION TO REVIEW THE DISTRICT COURT'S DENIAL OF IMMUNITY TO PETITIONERS ON RESPONDENT'S STATE LAW CLAIMS

The Third Circuit held that it lacked jurisdiction to review the denial of immunity to petitioners on the pendent state tort claims against them. *Brown v. Grabowski*, 922 F.2d 1097, 1109 (3d Cir. 1990). The panel's reasoning was based on a determination that the denial of immunity under state law on a motion for summary judgment did not implicate the same concerns regarding immunity from suit as in *Mitchell v. Forsyth*, 472 U.S. 511 (1985). According to the Third Circuit, the immunity provisions protecting police officers under New Jersey law provide immunity from liability rather than immunity from suit.

Petitioners erroneously contend that this ruling by the court of appeals creates a conflict among the circuits regarding the appealability of orders denying summary judgment on the basis of state law immunities. The reasoning of the court below is entirely consistent with those courts which have directly addressed this issue. In addition, petitioners' assertion that the court's analysis was contrary to Supreme Court precedent also is without merit.

In ruling that it lacked appellate jurisdiction to entertain petitioners' appeal based on the immunity defense raised pursuant to the New Jersey Tort Claims Act, the Third Circuit followed reasoning previously employed by the Fifth and the Sixth Circuits. *See Sorey v. Kellett*, 849 F.2d 960 (5th Cir. 1988); *Marrical v. Detroit News, Inc.*, 805 F.2d 169 (6th Cir. 1986). In *Sorey*, the Fifth Circuit referred to Mississippi case law but found no express guidance to determine whether the issue of qualified immunity under state law was a defense to liability or an immunity from suit. 849 F.2d at 962. The Fifth Circuit then properly considered state procedural law as relevant for what it revealed about the state's view on the substantive issue of whether the state immunity provided immunity from suit or merely a defense to liability. *Id. Sorey* concluded that a denial of immunity invoked under Mississippi law was appealable in accordance with the collateral order doctrine because a variety of considerations revealed that it, like the federal doctrine, provided immunity from suit. *Id.* at 963.

Through the same reasoning, the Sixth Circuit found no indication that Michigan's doctrine of immunity included a right to be free from trial. *Marrical v. Detroit*

News, Inc., 805 F.2d at 172. The court's discussion there focused on the inconvenience and cost of piecemeal litigation and distinguished Michigan's immunity provision from federal qualified immunity. *Id.* at 174. The court assessed the issue from the following perspective – the same standard later utilized in *Sorey*:

> We conclude that the right to an interlocutory appeal from the denial of a claim of absolute or qualified immunity under state law can only exist where the state has extended an underlying substantive right to the defendant official to be free from the burdens of litigation arising from acts taken in the course of his duties.

Id. at 172; *Sorey*, 849 F.2d at 962. The Sixth Circuit found that the law in Michigan on this issue did not afford state officers immunity from suit, but rather merely from liability. The court concluded as follows:

> We are reluctant to expand the small class of immediately appealable interlocutory orders without this clear statement of the compelling benefit to be achieved sufficient to justify imposing on litigants the burdens and delays of interlocutory appeals.

Id. at 174. The Third Circuit similarly found that New Jersey law took a disfavored view toward interlocutory appeals and thus declined to extend jurisdiction over the appeal on the state law claim. *Brown*, 922 F.2d at 1108-09.

Petitioners' contention that the analysis in *Brown* by the Third Circuit deviates from this Court's decision in *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196 (1988), is meritless. *Budinich* held that the assessment of whether an order is an appealable "final decision" under 28 U.S.C. § 1291 is to be governed by federal law. The discussion in

Brown addressing the appealability of the denial of state law immunity is prefaced by reference to *Budinich*:

> One implication of the Court's decision in *Budinich* is that our decision on the appealability of the district court's denial of defendants' motion for summary judgment should be governed solely by section 1291 as interpreted in *Mitchell*.

922 F.2d at 1106; *see also Sorey*, 849 F.2d at 962 (citing *Budinich*); *Marrical*, 805 F.2d at 172 ("the parties are bound by the federal procedural rules governing appeals, including the strictures of the collateral order doctrine"). The Third Circuit's opinion below is entirely consistent with *Budinich* because the opinion analyzes appealability within the parameters of the collateral order doctrine, referring to state law only to ascertain whether the state immunity was comparable to federal qualified immunity. Contrary to petitioners' contention, the holding by the court below conforms with *Budinich*, and it does not create a split among the circuits on the factors to be considered in assessing whether state law immunity provides immunity from suit or from liability. The divergent outcomes in *Brown*, *Sorey* and *Marrical* have nothing at all to do with a conflict among the circuits, but instead are a result of varied state statutes and particularized interpretations by their respective state courts and legislatures. The Third Circuit interpreted the appealability of the denial of immunity under state law in accordance with federal procedure, as required.

The crux of the analysis, though, is whether the state immunity extends to protect state officials from suit or from liability. To that end, petitioners ask that this Court rule upon a question solely involving New Jersey law yet

impose a uniform rule to review varied immunity provisions implemented by the several states. In essence, petitioners request that this Court decide for each of the individual states how their separate and distinct immunity provisions should be interpreted, clearly an inappropriate basis on which to seek a writ of certiorari.

Furthermore, immunity under the New Jersey Tort Claims Act is conceptually distinct from federal qualified immunity, and, hence, does not fall within the narrow exception carved out in *Mitchell v. Forsyth*. Since there is no evidence that New Jersey tort law immunities offer an entitlement not to undergo trial, as opposed to immunity from liability, petitioners' assertions pertaining to immunities under the New Jersey Tort Claims Act are not appealable. In fact, as the Third Circuit recognized, the many sections of the Act that address immunity speak solely in terms of immunity *from liability* and not of immunity from suit. *Brown*, 922 F.2d at 1108 (citing examples of provisions within New Jersey Tort Claims Act phrased in terms of immunity from liability). The court also properly turned to New Jersey case law and concluded that while no decisions address the issue of immunity from suit as *Mitchell v. Forsyth* does, "it seems noteworthy that they do speak explicitly in terms of immunity from a *liability*." *Id.* at 1108 (emphasis in original); *see, e.g., Rochinsky v. State of N.J. Dep't of Transp.*, 110 N.J. 399, 408 (1988) ("Even when one of the Act's provisions establishes liability, that liability is ordinarily negated if the public entity possesses a corresponding immunity"); *Lee v. Doe*, 232 N.J. Super. 569, 581 (App. Div. 1989) (New Jersey Tort Claims Act, and corresponding California act on which it is based, provide *immunity from*

liability); *see generally* Report of the Attorney General's Task Force on Sovereign Immunity (May 1972).

Petitioners also could have sought to appeal this aspect of the district court's decision under 28 U.S.C. § 1292(b) which permits appeal of an otherwise nonappealable order that involves a "controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." Petitioners have waived their opportunity to now raise any argument that the court of appeals should have exercised jurisdiction over this issue by failing to obtain such certification from the district court within ten days after entry of the order as permitted under the rules.

Therefore, since the decision below by the Third Circuit does not conflict with this Court or with any of the courts of appeals, and because the issue raised by petitioners does not involve an important question of federal law, but rather a question of state law, this matter is not appropriate for a writ of certiorari.

CONCLUSION

For the foregoing reasons, the requested writ of certiorari should be denied.

Respectfully submitted,

*Barry T. Albin, Esq.
James E. Trabilsy, Esq.
Richard P. Jacobson, Esq.
*Counsel of Record

Wilentz, Goldman & Spitzer
A Professional Corporation
90 Woodbridge Center Drive
P.O. Box 10
Woodbridge, New Jersey 07095
(908) 636-8000

DATED: May 28, 1991